IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 25TH JULY 2007 / 3RD SRAVANA 1929

CRL.A.No. 933 of 2007(B)

SC.332/2006 of ADDL. SESSIONS COURT (ADHOC)-I, KALPETTA

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APPELLANT/ACCUSED:

CHERIAN @ SAJAN JOSEPH, C.NO.3441,
CENTRAL PRISON, KANNUR.

BY ADV. ADV.ARUL KUMAR(STATE BRIEF)

RESPONDENT/COMPLAINANT:

STATE OF KERALA, CRIME NO.33/05,
BY EXCISE RANGE,SULTHAN BATHERY,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 933 OF 2007

Dated this the 25th day of July, 2007

JUDGMENT

This appeal is filed against the judgment in S.C. No.332 of 2006 on the file of the Additional Sessions Court (Ad hoc)-I, Kalpetta. The appellant faced trial for the offence punishable under Section 55(a) of the Abkari Act.

2. The prosecution case against the appellant was that on 21.5.2005 at about 4 p.m., while PW.1, the Preventive Officer attached to the Excise Enforcement and Anti-Narcotic Special Squad, Wayanad was on patrol duty in Padachira Village, he found the appellant carrying a big shopper containing 35 packets, each containing 100 ml., of Karnataka made arrack without any licence or permit under the provisions of the Abkari Act. To prove the case against the appellant, the prosecution examined PWs.1 to 6 and produced Exts. P1 to P7 as well as MOs. 1 to 3. No oral or documentary evidence was adduced on the side of the defence. On closing the prosecution evidence, the accused was questioned under

Section 313 Cr.P.C. The accused denied the allegations levelled against him. However, after considering the entire evidence, the trial court found the appellant guilty under Section 55(a) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of three months.

3. This appeal is filed through the jail authorities and the appellant is defended by a State Brief. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. PW.1 was the Preventive Officer attached to the Excise Enforcement and Anti-Narcotic Special Squad, Wayanad who detected the offence. He stated before the court below that on 21.5.2005 at about 4 p.m. while he was on patrol duty along with other officials, he saw the appellant coming along the road with a big shopper and on examining the big shopper it was found to contain 35 packets, each containing 100 ml., of Karnataka made arrack. He further stated that he took 200 ml. of arrack from two packets as sample, sealed and labelled the same , seized the contraband articles as per Ext.P2 seizure mahazar and arrested the accused on the spot after preparing Ext.P1 arrest memo. PW.2 was the Excise

Guard who had accompanied PW.1 at the time of detection of the offence. He supported the version given by PW.1 and identified the accused and the properties seized as per Exr.P2 seizure mahazar. PWs.3 and 4 were the independent witnesses who were examined to prove the arrest of the accused with the contraband articles. These witnesses denied having witnessed the arrest and hence, they were declared hostile. However, they admitted their signatures in Ext.P2 seizure mahazar. PW.5 was the Preventive Officer attached to the Excise Range Office, Sulthan Bathery. He stated that the accused and the contraband articles were produced before him and that he registered the case against the accused. He further stated that he had made a request to send the sample for chemical analysis. Ext.P7 is the chemical analysis report which shows that the sample contained 35.71% by volume of ethyl alcohol. PW.6 was the Excise Inspector of the Excise Range Office, Sulthan Bathery during the relevant time. He stated that he took over the investigation, questioned the witnesses, recorded their statements and laid the charge against the accused after completing the investigation.

5. The trial court relied on the evidence of PWs.1, 2 5 and 6 and found that the prosecution succeeded in proving the case against the appellant. Learned counsel appearing for the appellant submits that the

sample was not taken in the presence of any independent witnesses. As per Ext.P2 seizure mahazar, PWs.3 and 4 were present at the scene when the sample was taken and though these two witnesses did not support the prosecution case, they admitted their signatures in Ext.P2. The evidence of PWs.1, 2 and 5 would show that the appellant was found in possession of the contraband articles. But, the prosecution failed to establish that the appellant kept the contraband articles in connection with export, import, transport or transit as contemplated under Section 55(a) of the Abkari Act. and hence, no offence can be charged under the above section. This Court in the decisions reported in **Surendran v. Excise Inspector, 2004 (1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2) K.L.D. (Cri) 631** has held that an offence under Section 55(a) is attracted only when it is proved that possession of the contraband article is for the purpose of export, import, transport or transit. The prosecution only succeeded in proving that the appellant was found in possession of the contraband articles. If that be so, the offence will come under Section 58 of the Abkari Act.

6. In the above circumstances, the conviction entered under Section 55(a) of the Abkari Act is altered to Section 58 of the Abkari Act. The appellant is convicted under Section 58 of the Abkari Act and sentenced to

undergo simple imprisonment for one year and to pay a fine of Rs.1,00.000/- and in default of payment of fine, to undergo simple imprisonment for a further period of three months.

With the above modification in the conviction and sentence, the Crl. Appeal is dismissed.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.APPEAL NO.933/2007
JUDGMENT

25TH JULY, 2007.